In the Supreme Court of the United States

OCTOBER TERM, 1969

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND MEADOWS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the court of appeals entered on December 23, 1969, in the above case.

OPINIONS BELOW

The opinions of the district court (Appendix A, *infra*, pp. 7–8) and court of appeals (Appendix B, *infra*, pp. 9–15) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1969. On January 17, 1970, Mr. Justice Douglas extended the time to file a petition for a writ of certiorari until February 21, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTION PRESENTED

Whether the ruling in *Haynes* v. *United States,* 390 U.S. 85, should be applied retroactively, so as to require, on collateral attack, vacation of a conviction for violation of 26 U.S.C. 5851 based on a guilty plea.

STATEMENT

An indictment filed on December 15, 1965, in the United States District Court for the Northern District of California charged respondent with violating 26 U.S.C. 5851 by knowingly possessing a firearm which had not been registered with the Secretary of the Treasury, or his delegate, as required by 26 U.S.C. 5841. On December 23, 1965, respondent entered a plea of guilty. On June 20, 1966, he was sentenced to imprisonment for five years.[1]

On January 29, 1968, this Court decided in *Haynes* v. *United States,* 390 U.S. 85, that since the statutory scheme of the National Firearms Act required an individual whose activities were regulated by that statute to file documents with the government containing information incriminating under State or other federal laws, such a person could properly assert the privilege against self-incrimination as a complete defense to charges arising from a failure to file the prescribed forms. On July 25, 1969, eighteen months after the decision in *Haynes,* and in reliance upon that case, respondent filed in the district court a motion pursuant to Rules 32(d) and 35, F.R. Crim. P., seeking to withdraw his plea of guilty and

[1] Petitioner is presently on parole.

vacate the judgment. The district court denied the motion, holding that relief was not warranted either under Rule 32 or 28 U.S.C. 2255, on the ground that *Haynes* should not be accorded retrospective effect.

Finding that at the time of the plea it would have been futile to assert that the privilege barred prosecution under 26 U.S.C. 5851, in view of then existing law, the court of appeals reversed. It held, in effect, that petitioner could not have been deemed to waive his privilege because he had failed to assert a "hopeless contention" (App. 11). On the question of retroactivity, the court concluded that the *Haynes* ruling fell within a class of holdings whose purpose was to ensure the accuracy of the guilt-determining process or to correct an abuse that endangered the integrity of the fact-finding process, and should therefore be applied retroactively (App. 12–15).

REASONS FOR GRANTING THE WRIT

In a series of recent decisions this Court has held, as to a number of statutory schemes enacted under the taxing power, that the privilege against self-incrimination provided a complete defense to criminal prosecution for non-compliance because compliance with the statute would be potentially incriminating. *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62 (occupational and excise taxes with respect to wagering); *Haynes* v. *United States,* 390 U.S. 85 (possession of unregistered firearms); and *Leary* v. *United States,* 395 U.S. 6 (pur-

chase of marihuana without an order form). While, in view of the Court's subsidiary holding in *Grosso* (see 390 U.S. at 70–71), there is general agreement that these decisions apply to cases pending on direct review, the circuits are in conflict as to whether they apply retroactively to convictions which had become final. In particular, the circuits are in conflict as to whether a plea of guilty entered before the effective date of this Court's decision is subject to vacation on the ground that defendant could have asserted the privilege. The decision below follows the rationale of the Fourth Circuit in *United States* v. *Miller,* 406 F. 2d 1100 (firearms). A Fifth Circuit panel took the same position in *United States* v. *Lucia,* 416 F. 2d 920 (wagering tax), but that court is considering the question *en banc.* The Seventh and Tenth Circuits have reached the opposite conclusion. *Gillespie* v. *United States,* 409 F. 2d 511 (C.A. 7), pending on petition for a writ of certiorari, No. 390 Misc., this Term (firearms); *Eby* v. *United States,* 415 F. 2d 319 (C.A. 10) (marihuana).[2]

The question of the retroactivity of the privilege against self-incrimination decisions referred to previously is presently before this Court in other contexts. In *United States* v. *United States Coin and Currency,* No. 8, this Term, the question is whether the *Marchetti-Grosso* decisions apply to the seizure

[2] Cf. also Graham v. United States, 407 F. 2d 1313 (C.A. 6), pending on petition for a writ of certiorari, No. 294 Misc., this Term (wagering); there the Sixth Circuit held *Marchetti-Grosso* non-retroactive on collateral attack on a conviction not based on a guilty plea.

of property for forfeiture before the date of those decisions. In *Mackey* v. *United States,* No. 529, this Term, the question is whether an income tax conviction should be invalidated on collateral attack because wagering tax returns were introduced at trial. Also pending is the government's petition for a writ of certiorari on the question of the retroactive effect of *Leary* as applied to trials concluded before the effective date of that decision. *Santos* v. *United States,* 417 F. 2d 340 (C.A. 7), pending on petition for a writ of certiorari, No. 861, this Term.

While decisions in the pending cases against retroactive application would be dispositive here, contrary rulings would not necessarily be so because of the special factors inhering in a guilty plea. The government's position has consistently been that a guilty plea properly entered serves as a waiver of all non-jurisdictional defenses, "including (a defendant's) privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers." *McCarthy* v. *United States,* 394 U.S. 459, 466; *Boykin* v. *Alabama,* 395 U.S. 238. See our briefs opposing certiorari in the pending cases of *Gillespie* v. *United States,* No. 390 Misc., this Term, and *Drotar* v. *United States,* No. 1450 Misc., this Term, as well as in *Miller* v. *United States,* No. 106 Misc., this Term, certiorari denied, 396 U.S. 854.

We therefore suggest that action on this petition should be deferred to await decisions in the cases now pending. Depending on the rulings there, the present

case may be disposed of summarily or may require more extended consideration.

Respectfully submitted.

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Solicitor General.

WILL WILSON,
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BEATRICE ROSENBERG,
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Attorneys.

FEBRUARY 1970.

APPENDIX A

In the United States District Court for the Northern District of California

Criminal No. 40630

UNITED STATES OF AMERICA, PLAINTIFF

v.

RAYMOND MEADOWS, DEFENDANT

ORDER

Upon the motion of defendant Meadows, this matter came on for hearing before the Court, the defendant being represented by James F. Hewitt, Esq.

The Court finds that *Haynes* v. *U.S.,* 390 U.S. 85 (1968), is not retroactive.

Defendant presents this motion under Federal Rules of Criminal Procedure 32 and 35. The Government, at oral argument, contends that the matter is properly presented only by petition under Section 2255 of Title 28, United States Code. The Government contends that Rule 35 pertains only to imperfect sentences; since defendant claims the sentence is void, rather than imperfect, Rule 35 should have no application—*In Re Shepherd,* 195 F.2d 157 (1st Cir. 1952). In opposition, defendant points to *U.S.* v. *Miller,* 406 F.2d 1100 (4th Cir. 1969), for authority to proceed under Rules 35 and 32.

It was stipulated that defendant is in custody pursuant to the judgment and sentence in this case. Accordingly, the Court treats the matter as one under

Rules 32 and 35 and Section 2255 of Title 28, United States Code. As to the motion under Rules 35 and 32, the Court's finding that *Haynes* v. *U.S.* is not retroactive precludes a claim that manifest injustice will result from denial of the motion to withdraw plea.

It is therefore ordered that the motion to set aside judgment and withdraw plea is *denied.*

In respect to proceedings under Section 2255 of Title 28, United States Code, the Court finds that the files and records of the case, coupled with the Court's finding that *Haynes* v. *U.S.* is not retroactive, conclusively show petitioner is not entitled to relief; the motion is DENIED.

LLOYD H. BURKE,
United States District Judge.

APPENDIX B

United States Court of Appeals for the Ninth Circuit

RAYMOND MEADOWS, DEFENDANT-APPELLANT

v.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

No. 24,756

[December 23, 1969]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Before: MERRILL and WRIGHT, Circuit Judges, and BEEKS, District Judge*

WRIGHT, Circuit Judge:

The question before us is whether the Supreme Court's decision in *Haynes* v. *United States,* 390 U.S. 85, (1968) is to be applied retroactively. We hold that it is.

In *Haynes,* decided January 20, 1968, the Court held that a plea of the privilege against self-incrimination guaranteed by the Fifth Amendment was a complete defense to a prosecution under 26 U.S.C. § 5851 for possession of a firearm not registered pursuant to 26 U.S.C. § 5841. Appellant Raymond Meadows was indicted December 15, 1965, in the Northern District of California for violation of the identical statutory

*The Honorable William T. Beeks, United States District Judge for the Western District of Washington, sitting by designation.

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provisions involved in *Haynes*. He pleaded guilty on January 20, 1966, and was sentenced to a term of five years. On July 25, 1969, eighteen months after the decision in *Haynes,* he filed in the United States Distict Court for the Northern District of California a motion pursuant to Rule 32(d), F.R.Cr.P., seeking to withdraw his plea of guilty and to have the judgment against him vacated. The District Court denied the motion, and Meadows appeals.

I.

The Government first argues that appellant cannot benefit from *Haynes,* whether or not that case is applied retroactively. *Haynes,* it is argued, did no more than to create a new defense to a prosecution under § 5851, and that defense, like all others nonjurisdictional in nature, was waived by a plea of guilty. Since appellant did not assert the privilege against self-incrimination at the trial, it is said, he may not plead it now. We cannot agree.

Waiver is "the intentional relinquishment of a known right or privilege," *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938). It can only occur if the defendant possesses "an understanding of the law in relation to the facts," *McCarthy* v. *United States,* 394 U.S. 459, 466 (1969) and will not be presumed from a silent record. *Miranda* v. *Arizona,* 384 U.S. 436 (1966), *Carnley* v. *Cochran,* 369 U.S. 506, 516 (1962).

Under the circumstances of this case it is impossible to say that appellant had sufficient understanding of the "law in relation to the facts" to make a knowing waiver of his Fifth Amendment defense. At the time of his guilty plea, *Lewis* v. *United States,* 348 U.S. 419 (1955), and *United States* v. *Kahriger,* 345 U.S. 22 (1953), overruled in *Haynes* and its companion cases, were still unchallenged law. In this Circuit,

Starks v. *United States,* 316 F.2d 45 (9th Cir. 1963) and *Frye* v. *United States,* 315 F.2d 491 (9th Cir. 1963), closed the door to any contention that a plea of the privilege against self-incrimination barred prosecution under § 5851.

Appellant's mere failure to advance what at the time seemed a hopeless contention cannot fairly be deemed a deliberate renunciation of a right he knew he possessed. *United States* v. *Miller,* 406 F.2d 1100 (4th Cir. 1969); *United States* v. *Lucia,* No. 26,316 (5th Cir., Sept. 17, 1969). Nor are there any special circumstances showing waiver, as in *Masterson* v. *United States,* 293 F.Supp. 787 (D. Del. 1968).

A finding of waiver on this record, moreover, seems to us forbidden by the Supreme Court's holding in *Grosso* v. *United States,* 390 U.S. 62 (1968). In that case petitioner had been indicted for two distinct offenses—failure to pay the excise tax on wagering imposed by 26 U.S.C. § 4401, and failure to pay the occupational tax required by 26 U.S.C. § 4411. He pleaded the privilege against self-incrimination as a defense to the excise tax prosecution, but omitted to do so in regard to the counts for failure to pay the occupational tax. The Supreme Court nevertheless declined to find a waiver of the privilege as to the occupational tax. 390 U.S. at 70–71.

Despite the suggestions to the contrary in *Whaley* v. *United States,* 394 F.2d 399 (10th Cir. 1968), and *Sepulveda* v. *United States,* No. 232–68 (10th Cir., Aug. 11, 1969), which the Government urges us to follow, the case for waiver in *Grosso* was stronger, not weaker, than in this case. If waiver was not found where defendant knew his rights and actually pleaded them as a defense to another part of the same indictment, then *a fortiori* there should be no waiver where, as here, there is no suggestion that defendant either

knew or understood his rights. *United States* v. *Benner,* No. 23,026 at n.5 (9th Cir., Oct. 13, 1969); *United States* v. *Manfredonia,* 391 F.2d 229 (2d Cir. 1968); *Harris* v. *United States,* 390 F.2d 616 (8th Cir. 1968).

II.

We turn, then, to the question of retroactivity, the principal issue before us.

Prior to *Linkletter* v. *Walker,* 381 U.S. 618 (1965), there would have been no question but that *Haynes* was to be applied so as to overturn convictions that had become final before its date of decision. But in *Linkletter* the Supreme Court, abandoning its earlier practice of applying "new constitutional rules to cases finalized before the promulgation of the rule," 381 U.S. at 628, determined that prospective application of an overruling constitutional decision was justified: (1) where there had been substantial reliance by law enforcement authorities on the overruled decision; (2) where retroactive application of the new rule would have a substantial adverse impact on the administration of justice; and (3) where the abuse corrected by the new rule did not go to the "very integrity of the fact-finding process." *Linkletter,* 381 U.S. at 639; *Stovall* v. *Denno,* 388 U.S. 293, 297 (1967).

Absent such circumstances, we think it continues to be true that "[t]he essential function of courts . . . requires that the normal mode of judicial operation be retroactive," Mishkin, "The Supreme Court, 1964 Term, Foreword: The High Court, the Great Writ, and the Due Process of Time and Law," 79 Harv. L. Rev. 56, 60 (1965). This principle reflects the constraints appropriate to a system of judicial, as opposed to legislative, decisionmaking, *cf. James* v.

United States, 366 U.S. 213, 224–25 (1961) (opinion of Black, J.); Note, "Prospective Overruling and Retroactive Application in the Federal Courts," 71 Yale L.J. 907, 931–32 (1962), as well as considerations arising from fairness to similarly situated defendants, *see* Currier, "Time and Change in Judge-Made Law: Prospective Overruling," 51 U. Va. L. Rev. 201 (1965); Schwartz, "Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin," 33 U. Chi. L. Rev. 719 (1966), and from the difficulties otherwise created in the application and development of precedent, *Desist* v. *United States,* 394 U.S. 244, 258–59 (1969) (opinion of Harlan, J.).

Retroactivity, indeed, has been denied in two classes of cases only. First, there are the cases where the clear purpose of a new rule is to deter conduct extrinsic to the trial itself and unlikely substantially to affect the reliability of the determination of guilt. Such cases have principally involved the exclusion of evidence obtained by illegal searches and seizures. *Desist* v. *United States, supra; Fuller* v. *Alaska,* 393 U.S. 80 (1968); *Linkletter* v. *Walker, supra; cf. Williams* v. *United States,* No. 22,871 (9th Cir., Oct. 17, 1969). Second, there are the cases where the purpose of the new rule is ambiguous, but where retroactive application would mean substantial disappointment of rightful reliance on the old rule by law enforcement authorities, and place grave burdens on courts called upon to reopen cases long since closed. *De-Stefano* v. *Woods,* 392 U.S. 631 (1968); *Stovall* v. *Denno,* 388 U.S. 293 (1967); *Johnson* v. *New Jersey,* 384 U.S. 719 (1966); *Tehan* v. *Shott,* 382 U.S. 406 (1966).

But where the purpose of the new rule is to ensure the accuracy of the determination of guilt, or to correct an abuse that endangers "the very integrity of

the fact-finding process," *Linkletter,* 381 U.S. at 639, then decisions announcing the new rules have been held fully retroactive, *Arsenault* v. *Massachusetts,* 393 U.S. 5 (1968); *Roberts* v. *Russell,* 392 U.S. 293 (1968). This has been so even when retroactivity defeated well-founded prosecutorial expectations and required reopening of substantial numbers of cases. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Witherspoon* v. *Illinois,* 391 U.S. 510, 523 n. 22 (1968).

We believe that the rule announced in *Haynes* falls into the latter category of cases. The "integrity of the . . . process" by which appellant was tried and sentenced is no less impugned by his conviction for an offense that the United States has no power to punish than by his conviction for an offense he did not commit. In both situations the defect in the conviction, unlike that involved when illegally seized evidence is admitted or even when an improperly procured confession is received, goes to the very center of the legal justification for the punishment imposed. To be valid, a punishment following upon the determination that a certain set of facts exists must necessarily presuppose that that set of facts constitutes an offense, *see* H.L.A. Hart, Punishment and Responsibility 5. The decision in *Haynes* negates precisely that presupposition by holding that, as against a plea of the privilege of self-incrimination, § 5851 creates no offense. A punishment in disregard of *Haynes* hence cannot stand.

We may note that the practical consequences of our decision, in terms of reliance by law enforcement officials or the effect on judicial administration, will be small. Few convictions will be affected, as compared with the huge numbers that would have been overturned had *United States v. Wade,* 388 U.S. 218 (1967), or *Miranda v. Arizona,* 384 U.S. 436 (1966),

been given retroactive effect. Nor is there a prospect of the sort of "difficult and time-consuming" burden on the lower courts that the Supreme Court feared would be imposed by holding *Katz v. United States,* 389 U.S. 347 (1967), retroactive. *Desist v. United States,* 394 U.S. 244, 251. A plea of the privilege being a complete defense to a prosecution under § 5851, there is reason to anticipate neither protracted evidentiary hearings on applications for post-conviction relief nor a wave of reprosecutions of those who were convicted prior to *Haynes.*

Our conclusion in this case agrees with those reached by the Fourth and Fifth Circuits in similar cases. *United States v. Miller,* 406 F.2d 1100 (4th Cir. 1969); *United States v. Lucia,* No. 26316 (5th Cir., Sept. 17, 1969). We have read *Graham v. United States,* 407 F.2d 1313 (6th Cir. 1969), and respectfully disagree.

Reversed and remanded to the District Court with instructions to grant appellant's motion.

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APPENDIX C

United States Court of Appeals for the Ninth Circuit

RAYMOND MEADOWS, DEFENDANT-APPELLANT

v.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

No. 24756

Appeal from the United States District Court for the Northern District of California.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is *reversed* and that this cause be and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

Filed and entered December 23, 1969.

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